affirmed without opinion by the D.C. Circuit. 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. 1972). The Supreme Court granted certiorari, heard oral argument, but then affirmed the decision without opinion by an equally divided court, Justice Powell not participating. Fri v. Sierra Club, 412 U.S. 541 (1973).

To comply with Sierra Club, EPA issued "nondegradation" regulations in 1974 that established the basic elements of today's program, albeit in less detailed form. 39 FR 42514 (Dec. 5, 1974). The rules were formerly codified at 40 CFR § 52.21. These rules and regulations were upheld by the D.C. Circuit. Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976). Both the Sierra Club and industry groups then petitioned for certiorari; the Sierra Club's petition was denied, 430 U.S. 959 (1977), while industry's petition was granted under the name Montana Power v. EPA, 430 U.S. 953 (1977), but limited to two questions, including the fundamental issue of whether the regulations were authorized by statute. Congress, though, elected to resolve the issue itself before the Supreme Court made its decision. After Congress acted, the case was vacated and remanded for reconsideration in light of the Clean Air Act Amendments of 1977, 434 U.S. 809 (1977).

The legislative history relating the battle in Congress over passage of the PSD provisions of the CAA, CAA §§ 160-169, 42 U.S.C. §§ 7470-7479, reflects all the issues discussed above. In 1976, both Houses passed proposed Clean Air Act amendments that accepted the principle of prevention of significant deterioration. S. 3219, 94th Cong., 2d Sess. § 6, 122 CONG. REC. 30,762, 30,763-64 (Sept. 16, 1976); H.R. 10,498, 94th Cong., 2d Sess. § 108, 122 CONG. REC. 30,774, 30,780-84 (Sept. 16, 1976). The PSD law eventually passed in '77 follows "the outline of the old regulations

[the '74 regulations adopted in response to Sierra Club v. Ruckelshaus at 39 FR 31000], but are in many ways more elaborate and more stringent." 44 FR 51924 (Sept. 5, 1979). But in 1976, a conference committee agreement resolving differences between the House and Senate bills died at the end of the 1976 session because of a Senate filibuster prompted largely by the PSD provisions. H.R. REP. No. 1742, 94th Cong., 2d Sess. (1976), reprinted in 5 Lib. of Cong., "A Legislative History of the Clean Air Act Amendments of 1977" 4287 (1978). The filibuster may be found at 122 CONG. REC. 33,897-900 (Sept. 30, 1976); 122 CONG. REC. 34,375-403, 34,405-18 (Oct. 1, 1976), reprinted in large part in 5 Lib. of Cong., "A Legislative History of the Clean Air Act Amendments of 1977" at 4411-4500. An account of the filibuster is contained in B. Asbell, "The Senate Nobody Knows" (1978). Other factors contributing to the filibuster were the proposed emissions standards for automobiles, id. at 440; Congress Adjourns After Delays; Clean Air Bill Dies in Filibuster, N.Y. Times, Oct. 2, 1976, at 7, col. 1, and strict limits on industrial development that essentially barred new major stationery sources in nonattainment areas, [7 Current Developments] Env't Rep. (BNA) 918-19 (Oct. 22, 1976) (quoting Roger Strelow, EPA Assistant Administrator for Air). *See* Oren, supra, 74 Iowa L. Rev. at 10-11, FN 47-48. Thus, consistent with discussion above about concern of possible flight of industry from nonattainment areas, one of the reasons for the filibuster killing the '76 bill was its strict PSD increment limits on industrial development that essentially would have barred new major stationery sources in nonattainment areas.

The legislative history to the PSD provisions of the CAA eventually passed in '77 reveals a significant battle over establishing the level of the PSD increments. Congress

was aware, it appears, that it was setting "the annual increments much more leniently than the twenty-four-hour and three-hour increments: that is, the annual increments are set sufficiently high that, on average, it is very improbable that a source that consumes all of the twenty-four-hour increment will consume all of the annual increment." Oren, supra, 74 Iowa L. Rev. at 37. The legislative history shows that PSD's sponsors, at least, seemed to have understood that the annual increments would be more lenient than the short-term standards. *See*, e.g., 123 CONG. REC. 26,845 (Aug. 4, 1977) (remarks of Senator Muskie that 'the most crucial and limiting increment is frequently the 24-hour sulfur dioxide increment'); 1977 House Report, reprinted in 4 1977 LEGISLATIVE HISTORY 2636-37 (explaining need for short-term increments).

The sponsors of PSD also "seem to have anticipated that the increments would rarely be violated, except in or near Class I areas." Oren, supra, 74 Iowa L. Rev. at 37.

> Rather, the Congressional codifiers of PSD used EPA projections to argue that, by requiring BACT, expected industrial growth could be permitted within Class II, or at worst, within Class III areas.

Id.

For instance, EPA projections showed that the House's Class II increment could accommodate large refineries, power plants, or pulp and paper mills. Id.; *see also* 1977 House Report, H.R. REP. NO. 294, 95th Cong., 1st Sess. 139, 160-62 (1977) reprinted in 1977 LEGISLATIVE HISTORY, 4 Lib. of Cong., "A Legislative History of the Clean Air Act Amendments of 1977" at 2627-29 (1978) ("Some have argued that the Class II increments will not accommodate sufficient industrial development. But EPA ... under both the [Ford] and [Carter] administrations" [has] "analyzed the committee bill's increments and ... refuted this contention.").

But even though EPA projections showed that the House's Class II increment could accommodate large refineries, power plants, or pulp and paper mills, the Senate-House conferees still increased the Class II and Class III three-hour SO2 increments over the House's proposal to allow even additional room for development. Oren, supra, 74 Iowa L. Rev. at 37; 123 CONG. REC. 27,069 (Aug. 4, 1977) (remarks of Rep. Rogers), reprinted in 3 1977 LEGISLATIVE HISTORY, 3 Lib. of Cong., "A Legislative History of the Clean Air Act Amendments of 1977" at 318; H.R. CONF. REP. NO. 564, 95th Cong., 1st Sess., reprinted in 3 1977 LEGISLATIVE HISTORY, 3 Lib. of Cong., "A Legislative History of the Clean Air Act Amendments of 1977" at 531. The House bill would have provided Class II and Class III increments at 25% and 50% of the SO2 NAAQS. H.R. 6161, 95th Cong., 1st Sess. § 108(a) (1977) (adding proposed § 160(c)(2)(B)-(C)), reprinted in 4 1977 LEGISLATIVE HISTORY, 4 Lib. of Cong., "A Legislative History of the Clean Air Act Amendments of 1977" at 2282. Since the 3-hour ambient standard for sulfur dioxide is 1300 micrograms, 40 CFR § 50.5, the 3-hour increments under the House bill would have been 325 for the Class II increment and 650 micrograms for the Class III increment. Instead the final '77 bill established limits of 512 for the Class II three-hour standard and 700 micrograms for the Class III three-hour standard. CAA § 163(b), 42 U.S.C.A. § 7473(b).

In contrast to the NAAQS, where Congress provided for EPA to set the primary and secondary standards under CAA § 109, 42 U.S.C.A. § 7409, Congress itself set the maximum PSD increments for each of the three classes under CAA § 163(b), 42 U.S.C.A. § 7473(b). A comparison of the SO2 PSD increments established by Congress under CAA § 163(b) to the SO2 PSD increments established by the EPA

under its 1974 PSD regulations reveals, however, that the PSD increments established by Congress for Class I areas were exactly the same as those established by EPA under the '74 regulations. *Compare* CAA § 163(b)(1), 42 U.S.C.A. § 7473(b)(1), to 40 CFR § 52.21(c)(2) published at 39 FR 31000, 31007 (August 27, 1974). The Class II and Class III increments for SO2 set by Congress were more stringent than the Class II and Class III increments set by the EPA under its '74 regulations. Id. However, in light of Congress's knowledge that the EPA projections showed that the '77 House Bill's Class II increments could accommodate large refineries, power plants, or pulp and paper mills, Congress apparently knew that these more stringent Class II and Class III standards would have little practical effect.

Congress also set forth a procedure of how PSD variances can be granted for Class I increments, and alternative PSD increments that cannot be exceeded if PSD Class I variances are granted. CAA § 165(d), 42 U.S.C.A. § 7475(d). These alternative Class I increments are essentially the same as the Class II increments, except the Senate-House conference committee apparently forgot to change the House Class I 3-hour alternate increment of 325 micrograms per cubic meter at CAA § 165(d)(2)(C)(iv) when it raised the Class II three-hour increments from 325 to 512. *Compare* CAA § 163(b)(2), 42 U.S.C.A. § 7473(b)(2) to CAA § 165(d)(2)(C)(iv), 42 U.S.C.A. § 7475(d)(2)(C)(iv), and the Legislative history discussed above. The CAA does not allow a PSD variance for Class II and Class III areas. The reason that no variance procedure was necessary is apparent from the above history – Congress did not anticipate that the Class II and Class III increments would be exceeded. Further, if a Class II increment is exceeded, the state has the option of re-designating the area as a Class III area. CAA

§ 164(a)(A), 42 U.S.C.A. § 7474(a)(A). No state has ever re-designated an area from Class II to Class III. Robert L. Glicksman, *Pollution on the Federal Lands I: Air Pollution Law*, 12 U.C.L.A. J. Envtl. L. & Pol'y 1, 30-31 (1993). "Likewise, states have been reluctant to redesignate non-mandatory areas as class I, in part because states often are averse to the restrictions on development that stem from class I status." Id. at 31.

John Quarles was the acting administrator of EPA when the EPA promulgated the 1974 PSD regulations in response to Sierra Club v. Ruckelshaus at 39 FR 31000. *See* 39 FR at 31007. Testifying in a House hearing in 1981, Mr. Quarles stated:

> [The Class II increment] was simply plucked off the ceiling at the time that EPA was developing the program, and Congress wrote it into the statute in 1977. There is no way you could relate that increment or any other increment to any health effect or welfare effect or any identifiable effect of any sort.

Oren, supra, 74 Iowa L.Rev. at 24, FN 86. *See also* 39 FR at 31001(increments "subjective").

In contrast to the NAAQs, which under CAA § 109(b) must be based on "criteria" documents setting forth scientific knowledge about health and welfare effects, the PSD increments are subjective and arbitrary. There was no particular air quality significance to the size of the increments for each class chosen by Congress in 1977: "this is not surprising, since there is no air quality effect that is caused by new emissions rather than old emissions." Oren, supra, 74 Iowa L.Rev. at 24. "Rather, the increments for each class were chosen as a rough measure of whether an area should be kept at its present air quality, or whether moderate or greater growth is appropriate." Id. This conception of increments goes back to the increment scheme proposed by EPA in 1974 in response to Sierra Club v. Ruckelshaus at 39 FR 31000, at 31,003. Oren at FN 87.

And is also evident in the statements of PSD's sponsors in 1976 and 1977, for example the statement by Senator Domenici that Class II increment was "designed to accommodate well planned orderly growth". Oren at FN 87.

In sum, after following the whole circuitous route that established the PSD increments for all three classes at CAA § 163(b), 42 U.S.C.A. § 7473(b) under the '77 amendments to the CAA, the road leads back to the same underlying reason that the Sierra Club v. Ruckelshaus case was filed in the first place -- to prevent (1) a flight of industry from nonattainment regions under the NAAQs and (2) the potential "race to the bottom" competition between states in which states would set the most lenient standards they could to attract the industries that might be moving from nonattainment regions. The increments were arbitrarily chosen to accomplish this goal. They have no scientific basis or purpose. Congress itself defined the purpose of the PSD law:

> The purposes of this part are as follows:
>
> (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution [(]or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air), notwithstanding attainment and maintenance of all national ambient air quality standards;
> (2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;
> (3) *to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources*;
> (4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and
> (5) to assure that any decision to permit increased air pollution in any area to which this section applies *is made only after careful evaluation of all the consequences of such a decision* and after adequate procedural opportunities for informed public participation in the decision making process.

CAA § 160, 42 U.S.C.A. §7470. (Corrections added, emphasis supplied.) The above detailed summary of the history of the establishment of the increments shows that the Congress' stated intent that PSD law "*insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources*" involved not only (1) a concern about "clean air" and the environment, but also (2) a concern about "economic growth" (which is the context in which the Sierra Club v. Ruckelshaus case was filed and the PSD law was passed) and (3) a concern about the threat of a large scale shifting of industry from NAAQS "nonattainment" areas to "clean air" areas like North Dakota. Using the terms coined by Professor Oren, the effect of the PSD law was to compel industrial sources in nonattainment or dirty air areas to put on air pollution controls or "control-compel" rather than "site-shift" to a clean air area where they could run the facility without pollution controls. 74 Iowa L. Rev. at 29-30 (using those terms in the context of the effects of the PSD law on pollution control and management decisions in NAAQs "attainment" or clean air areas).

One other aspect of the '77 amendments needs to be clarified concerning the federal grasslands and other federal lands located in North Dakota. Congress designated all NAAQs attainment areas such as North Dakota (as well as areas that were unclassifiable under the NAAQs) as Class II PSD areas. CAA § 162(b), 42 U.S.C.A. § 7472(b). This Class II designation included all federal lands, except for the national and international parks and national wilderness areas designated under CAA § 162(a), 42 U.S.C.A. § 7472(a).

> Before the 1977 amendments, the federal land managers (FLMs) of federally-owned clean air areas had the same power to control redesignation that states had over non-federal lands. The 1977

> amendments removed the FLMs' control of redesignation, leaving them with mere advisory powers. If a state proposes to redesignate an area containing federal lands, it must notify the FLM, who may then submit comments. States must explain any disagreement with the land manager but need not abide by his or her recommendations. Indeed, the Act requires that FLMs recommend reclassification to class I of all areas in which air quality related values are important attributes. The Forest Service and the Interior Department recommended in 1979 and 1980 that 59 areas be upgraded to class I status, but the states refused to reclassify any of them.

Glicksman, supra, 12 UCLA J. Envtl. L. & Pol'y at 31. This change was important for North Dakota because of the large areas in the western part of the state that are federal grasslands. Under the '77 amendments, Congress took the authority to redesignate these areas from the federal land managers (FLMs) and gave that power to the states. *See* CAA § 164(b)(2), 42 U.S.C.A. § 7474(b)(2); Kerr-McGee Chem. Corp v. Dep't of Interior, 709 F.2d 597 (9th Cir. 1983).

In 1978, the EPA revised its regulations to respond to the many changes made in the PSD program by the 1977 amendments to the CAA discussed above. *See* 43 FR 26380, supra, and the rule revisions to the PSD program promulgated therein. These revised rules were challenged before the D.C. Circuit by both environmental and industry groups in the Alabama Power case. *See* Alabama Power, 636 F.2d at 346-52. The court invalidated crucial portions of the regulations as contrary to the language of the 1977 Amendments, including invalidation of the uniform baseline date set in the rules and strong language indicating the baseline concentration is to be determined using "actual air quality data." Id. at 374-376. This necessitated the comprehensive revision of the rules published at 45 FR 52675 on August 7, 1980.

The federal PSD statutes under the '77 CAA amendments, and the PSD rules and regulations at 45 FR 52675 as revised in response to Alabama Power, have

remained essentially unchanged since 1980 and are still the governing federal laws and guidance on the issues of establishing a "baseline concentration" under PSD and calculating "increment consumption". The 1980 regulations, therefore, will be the focus of the legal discussion concerning how "baseline concentration" should be established.

C. Settlement of Challenge to '80 Regulations

Just as the '78 PSD regulations that EPA promulgated after the '77 amendments to the CAA were challenged in Alabama Power, the '80 regulations at 45 FR 52675 were also challenged in federal court soon after they were published in the federal register by several industry and environmental groups, which was eventually consolidated into one case. Chemical Mfrs. Ass'n v. EPA, No. 79-1112 (D.C. Cir.). EPA reached a settlement agreement with most of the industry challengers in February 1982. This decision is referenced in Basin Electric's letter, and a copy of this unpublished consent decree has been provided to the Department. In this settlement, the EPA agreed to propose to revise its rules in various respects. EPA, though, has not carried out either the proposals or the proposed revisions as contemplated in the decree. The Department believes this consent decree can be given some weight in interpreting the meaning of the '80 regulations, but that CAA § 161, 42 U.S.C.A. § 7471, requires the Department to look first to the "regulations promulgated under this part" (i.e., the PSD regulations at 45 FR 52675) in exercising its discretion to manage the increment and apply North Dakota's PSD rules to stationary sources in the state. Until the provisions of the Chemical Mfrs. decree are implemented into regulations, as were the provisions of the Alabama Power decision, the Department must look first to the promulgated regulations for guidance in interpreting its rules.

2. Discussion of the Statutory and Regulatory Requirements for Making Increment Management Decisions regarding PSD Baseline Concentration and Increment Consumption

This discussion will begin with an analysis of the differences between federal rules, interpretive rules, policy statements, and guidance, and the rules of construction and deference that apply. It will then discuss in detail the legal meaning of "baseline concentration" under the relevant federal PSD statute and state and federal rules and regulations, and how the regulations indicate that the "baseline concentration" should be used in calculating increment consumption in either (1) the context of determining whether existing sources are violating the increment, or, (2) the context of review of modifications to an existing source or review of a new source.

A. Federal Rules, Interpretive Rules, Policy Statements, and Guidance

CAA § 307(d), 42 U.S.C.A. § 7607(d), provides the specific rulemaking procedure that must be followed by the EPA under the CAA rather than the more general rulemaking procedure under sections "553 through 557" (5 U.S.C.A. §§ 553-557) of the federal Administrative Procedure Act that ordinarily applies to federal agency rulemaking. CAA § 307(d)(1), 42 U.S.C.A. § 7607(d)(1).

CAA § 307(d)(1)(J), 42 U.S.C.A. § 7607(d)(1)(J), specifically applies the CAA rulemaking procedure to the PSD law. The PSD law is "Part C of subchapter I" of the CAA at CAA §§ 160-169, 42 U.S.C.A. §§ 7470-7479. The PSD law, CAA § 161, 42 U.S.C.A. § 7471, requires the SIP to contain "emission limitations" and "such other measures as may be necessary, as determined under regulations promulgated" by the EPA pursuant to CAA § 307(d), 42 U.S.C.A. § 7607(d). Thus, the Department must

look to and rely upon the PSD regulations promulgated by the EPA pursuant to CAA § 307(d) in interpreting and applying its PSD rules at N.D. Admin. Code ch. 33-15-15.

Although the general rulemaking procedure under §§ 553-557 of the federal Administrative Procedure Act is replaced by the specific rulemaking procedure at CAA § 307(d), the general provisions of §§ 551-552 of the federal Administrative Procedure Act apply to the CAA in terms of dividing EPA rules and regulations into three categories: (1) legislative rules [5 U.S.C.A. § 551(4); (2) interpretive rules [5 U.S.C.A. § 552(a)(1)(D)]; and (3) policy statements [5 U.S.C.A. § 552(a)(2)(B)]. Appalachian Power Company v. EPA, 208 F.3d 1015, 1020-22 (D.C. Cir. 2000) (invalidating EPA's "periodic monitoring guidance" under the CAA's Title V operating permit program as improperly amending and broadening EPA's earlier Title V regulations).

Only "legislative rules" have the force and effect of statutory law. Appalachian Power Company, 208 F.3d at 1020, *citing* Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 & FN 31 (1979). A "legislative rule" is one the agency has duly promulgated in compliance with the procedures laid down in the statute (in this case CAA § 307(d)) or in the federal Administrative Procedure Act (APA). Appalachian Power Company, 208 F.3d at 1020. Under both the APA and the CAA, a "legislative rule" or "rule" is defined as follows:

> ... the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency....5 U.S.C. § 551(4).

Appalachian Power Company, at 1020, FN 11. *Compare* N.D.C.C. § 28-32-01(11).

The second category under the APA are interpretive statements of general applicability. APA § 552(a)(1)(D) requires publication in the Federal Register of all

"interpretations of general applicability." Appalachian Power Company, at 1020, FN 12, *citing* 5 U.S.C. § 552(a)(1)(D). These "interpretations of general applicability" published in the Federal Register are generally referred to as "interpretive rules." *See* American Min. Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (defining "interpretative rules" as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers"), *citing* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements,* 75 Mich.L.Rev. 520, 542 & n. 95 (1977) (reading legislative history of the APA as "suggest[ing] an intent to adopt the legal effect test" as marking the line between substantive and interpretive rules). "Interpretive rules" do not have to be either promulgated or published in the Federal Register. APA § 553(b), 5 U.S.C.A. § 553(b). However, as discussed in more detail below, an "interpretive rule" that is not promulgated as required in its implementing statute and published in the Federal Register is not "binding" as an interpretation of "general applicability." Appalachian Power Company, at 1020, FN 12, *citing* 5 U.S.C. § 552(a)(1)(D).

Since APA § 552 was not excluded from application to the CAA under CAA § 307(d)(1), the requirement that "interpretations of general applicability" be published in the Federal Register applies to EPA regulations promulgated under the CAA just as it does to other federal agencies. *See* CAA § 307(d)(1), 42 U.S.C.A. § 7607(d)(1), which excludes APA "sections 553 through 557" from application to CAA rulemaking "except as expressly provided in" CAA § 307(d), but which does not exclude the other provisions of the APA from application to the CAA such as APA § 552(a)(1)(D), 5 U.S.C. § 552(a)(1)(D).

The third category under the APA is the general catchall category of "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." APA § 552(a)(2)(B), 5 U.S.C.A. § 552(a)(2)(B). These unpublished interpretations and policy statements must be made available to the public for "inspection and copying", but there is no requirement that they be published. Appalachian Power Company, at 1020, FN 12, *citing* 5 U.S.C. § 552(a)(2)(B). If an "interpretive rule" is not promulgated and published in the Federal Register, it falls into this third category. *Compare* APA § 552(a)(1)(D), 5 U.S.C.A. § 552(a)(1)(D) to APA § 553(b)(1), 5 U.S.C.A. § 553(b)(1).

The deference courts give to agency rules and interpretations of the law the agency administers is generally referred to as "Chevron-style deference" or "Chevron deference." *See*, e.g., Christensen v. Harris County, 529 U.S. 576, 587 (2000) (calling such deference "Chevron-style deference"); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 490-91 (2nd Cir. 2001) (calling such deference "Chevron deference").

Chevron involved the review of an "interpretive rule" promulgated and published in the Federal Register under the NSPS provisions of the CAA relating to the plantwide definition of the term "stationary source" as promulgated at 46 FR 50766 (October 14, 1981). Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 840-41 (1984). These regulations addressed the requirements that "nonattainment" states had to establish in their NSPS permit programs to regulate "new or modified major stationary sources" of air pollution. Id., summary at 837. The '81 regulations allowed states to adopt a definition of "stationary source" under which "an existing plant

that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions" if the alteration did not "increase the total emissions from the plant, thus allowing a State to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble.'" Id.

The issue was whether this "bubble concept" was permissible under CAA § 302(j) [42 U.S.C.A. § 7602(j)] and the other relevant '77 amendments to the CAA. Id. at 851-52. The Court determined that the language of the statutes, when examined closely, simply did not compel any given interpretation of the word "source." Chevron, 467 U.S. at 851-65. Consequently, the Chevron court determined it would give "deference" to EPA's decision under the '81 regulations to define "source" in a way that allowed states to treat all the pollution-emitting devices within the same industrial grouping as though they were a single source encased in a single "bubble". Id. at 865 (stating specifically that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." (Footnotes omitted, emphasis supplied)). The Chevron Court held:

> In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one.

Id. at 845.

In analyzing the CAA and EPA's implementing regulations as promulgated in the Federal Register, the Chevron Court summarized the general underlying rules of construction and interpretation that it would apply in reviewing an agency's construction of the statute it administers:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

437 U.S. at 436-37. (Footnotes omitted.) Most state supreme courts, including the North Dakota Supreme Court, have adopted some form of Chevron deference in reviewing agency constructions of state statutes. *See* Delorme v. North Dakota Dept. of Human Services, 492 N.W.2d 585, 587-88 (N.D. 1992) (citing Chevron passim.).

Recently, however, the United States Supreme Court has determined that it will not apply Chevron deference to interpretations contained in agency letters, manuals, policy statements, and similar interpretations and guidance that are not promulgated after public hearing and comment in the Federal Register.

> Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.

Christensen, 529 U.S. at 587. "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' ... but only to the extent that those interpretations have the 'power to persuade.'" Id. Based on this distinction, Christensen held that an opinion letter by the Department of Labor deserved only this form of limited deference in its interpretation of a provision of the Fair Labor Standards Act. Id.

Christensen makes clear that courts do not face a choice between *Chevron* deference and no deference at all. Id. at 587. Administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference: the agency position should be followed to the extent persuasive. United States v. Mead Corp., — U.S. —, 121 S. Ct. 2164, 2175-76 (2001). Other courts agree that the Christensen and Mead qualification to Chevron deference that unpublished and un-promulgated guidance, interpretations, and legal positions taken in various agency documents "are entitled to respect" but only to the extent those interpretations have "the power to persuade." *See*, e.g., Catskill Mountains, 273 F.3d 481 at 491 ("[A] position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify Chevron deference."), *citing* Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 365 (4th Cir. 2000) and S. Utah Wilderness Alliance v. Dabney, 222 F.3d 819, 828 (10th Cir. 2000); Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1082 (9th Cir. 1999) (where agency expresses interpretation in litigation rather than regulation, deference unwarranted); U.S. v. Ford Motor Co., 736 F. Supp. 1539, 1547 FN5 (W.D. Mo. 1990) (extent of agency's authority under the law not subject to deference); Port of Portland v. Director, OWCP, 192 F.3d 933, 939 (9th Cir. 1999) (interpretation must be reasonable for Chevron deference to apply).

Appalachian Power recently summarized the dilemma faced by states implementing and enforcing complicated environmental laws and the industries regulated by them regarding unpublished and unpromulgated guidance, interpretations, and legal positions EPA has taken in various agency documents:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

208 F.3d at 1020.

A states' workgroup urging reform of the NSR-PSD law recently commented in a report issued to EPA Administrator Christine Whitman:

> Probably more than any of the other federal air programs, the PSD program is being dictated more by guidance than by rule. As with the other programs, the USEPA is issuing written guidance with the best of intentions [–] namely, to clarify the existing rules and/or the intent of the underlying statute. Whatever the intention, however, the guidance (particularly when developed over so many years) may be leading to an entirely new vision of the program. More importantly, this new vision is becoming the one held by the agency that issued the guidance rather than the legislatures who passed the laws.
>
> ....
>
> The sheer number of "instructions" and "clarifications" is overwhelming. On August 7, 1980, the PSD regulations were published in the Federal Register. The regulations, amended in response to ... Alabama Power v. Costle, were contained in less than 20 pages of the Federal Register. The supporting information, published by the USEPA, was over 75 pages long. That was only the beginning. Indeed, the guidance for the PSD program has now become so voluminous that five four inch binders are now needed to contain over 4,000 pages of material. There is little wonder that

> with twenty years of guidance the vision of the PSD program has become blurred.

Executive Summary, Workgroup Report submitted by Michigan, Alabama, North Carolina, South Carolina, Virginia, and West Virginia regarding PSD-NSR reform, pp. 11-12 (submitted by March 12, 2001 letter from Russel J. Harding, Director, Mich. DEQ to EPA Administrator Christine T. Whitman).

Appalachian Power sets forth the following standard for determining when EPA guidance or memoranda become a de facto rule:

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."

208 F.3d at 1021.

Appalachian Power skirts the most difficult issue relating to the use of guidance or agency memoranda for rulemaking under the CAA, however. It notes that "[i]nterpretative rules" and "policy statements" may be rules within the meaning of the APA and the CAA, although neither type of "rule" has to be "*promulgated* through notice and comment rulemaking." 208 F.3d at 1021 (emphasis supplied), *citing* CAA § 307(d)(1), 42 U.S.C.A. § 7607(d)(1) referring to APA § 553(b)(A) & (B), 5 U.S.C.A. § 553(b)(A) & (B). It cites in a footnote two conflicting lines of cases concerning whether policy statements are rules, but determines there is no need to reconcile the two lines of authority because "[n]othing critical turns on whether we initially characterize the Guidance as a rule." 208 F.3d at FN 13. It then sets aside the guidance because it has "in effect" amended the relevant promulgated rule. 208 F.3d at 1028. In fact, because

of the "intertwined nature of the challenged and unchallenged portions" of the guidance, EPA's entire periodic monitoring guidance under the CAA's Title V operating permit program was set aside. 208 F.3d at 1029. Appalachian Power, however, begs the critical question of whether the CAA § 307(d)(1) reference to 5 U.S.C.A. § 553(b)(A) & (B) allows EPA to amend promulgated rules by guidance and policy statements. Its holding suggests, however, that when a guidance or policy statement becomes a de facto rule that "in effect" amends a promulgated rule in an important way, it will be set aside.

The CAA sets forth the following requirements for promulgating rules under that law:

> In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, [which notice] shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period").

CAA § 307(d)(3), 42 U.S.C.A. § 7607(d)(3) (bracketed language added for clarification).

The CAA does except "any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5" from the promulgation requirements of CAA § 307(d)(3). CAA § 307(d)(1), 42 U.S.C.A. § 7607(d)(1). In context, the relevant subparagraphs of the APA provide:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
> (2) reference to the legal authority under which the rule is proposed; and
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

APA § 553(b), 5 U.S.C.A. § 553(b).

EPA seems to have argued in Appalachian Power that the exception from the promulgation requirements in CAA § 307(d)(1) for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" under APA § 553(b)(A) allows it to amend promulgated rules by such informal interpretations, statements of policy, and guidance. If that is EPA's position, it is in error under the PSD provisions of the CAA for at least two reasons.

First, as noted above, CAA § 307(d)(1) does not exempt the CAA from application of the entire APA, but only certain specifically identified sections:

> The provisions of section[s] 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection [the CAA "rulemaking" subsection] shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

CAA § 307(d)(1), 42 U.S.C.A. § 7607(d)(1) (letter and language in brackets added for clarification). APA § 552 was not excluded from application to the CAA under CAA § 307(d)(1). APA § 552(a)(1)(D) requires publication in the Federal Register of all "interpretations of general applicability." Appalachian Power Company, at 1020, FN 12, *citing* 5 U.S.C. § 552(a)(1)(D). Thus, the APA's requirement that "interpretations of